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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 155

MICHIGAN NATIONAL BANK, a banking association organized under the laws of the United States,

Appellant,

NATIONAL BANK OF WYANDOTTE, THE FIRST NATIONAL BANK (THREE RIVERS, MICHIGAN), COMMERCIAL NATIONAL BANK OF IRON MOUNTAIN, THE NATIONAL BANK OF JACKSON, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF KALAMAZOO, banking associations organized under the laws of the United States,

Intervening Plaintiffs,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and LOUIS M. NIMS, STATE COMMISSIONER OF REVENUE,

Appellees.

On Appeal from the Supreme Court of the State of Michigan.

MOTION OF THE FRANKLIN NATIONAL BANK OF LONG ISLAND FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE

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MOTION OF THE FRANKLIN NATIONAL BANK OF LONG ISLAND FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

THE FRANKLIN NATIONAL BANK OF LONG ISLAND, a national banking association, operating in the State of New York, respectfully moves this Court for leave to file the

accompanying brief in this case as *amicus curiae*. The consent of the appellant herein has been obtained to the filing of a brief as *amicus curiae* by the applicant, but appellees herein have refused to consent.

The applicant, The Franklin National Bank of Long Island, has an interest in this case in that:

(a) It has now pending (as plaintiff) in the Supreme Court of the State of New York an action for a declaratory judgment, entitled *The Franklin National Bank of Long Island v. G. Russell Clark as Superintendent of Banks of the State of New York and others* (New York County Clerk's Index No. 9734/1960), in which two of the questions importantly involved are closely related to a main question presented for decision in the instant case. They are: first, whether, *as a matter of law*, a savings and loan association or similar banking institution, no matter how great the extent of its employment of capital in competition with a national banking association, must, nevertheless, be deemed not a similar institution and thereby become immune from burdens statutorily imposed on national banking associations; and, second, whether the Court, because *as a matter of law* it assumes similarity (or dissimilarity), may refuse to receive evidence as to the factual identity or non-identity of the operations of competing banking institutions.

(b) In the State of New York, taxes against national banking associations, such as applicant, are levied on a basis different from those levied against savings and loan associations, with the result that a discriminatory tax could be levied upon applicant's shares if this Court should determine that, *as a*

matter of law, irrespective of the *fact* of competition, savings and loan associations are not in competition with national banking associations.

(c) The determination in the instant case that, as a *general* proposition, *as a matter of law*, savings and loan association may not be deemed in competition with a national banking association, could have disastrous repercussions against applicant and others similarly situated.

In the case now at bar, appellant has ably presented the reasons, based upon the record facts, why it should have judgment. Applicant fully supports the arguments and position of appellant (and the intervening plaintiffs).

Appellant, in the courts below, has briefed and argued the effect of changing economic conditions; but the Court of Claims and the Supreme Court of Michigan appear to have rested their conclusions upon *generalities* extracted from statements made in decisions of an earlier era. Although the opinions, below, made formal obeisance to the existence of specific economic facts in the record, they utilized these facts mainly for the purpose of determining the nature of the tax imposed. Their final conclusions in all other respects appear to have emerged "on the ground of public policy * * * grounded in history and on precedent." (*Cf.*, Conclusions numbered 1 and 2 in the opinion of the Court of Claims; Appendix A of Jurisdictional Statement, p. 41b). Neither appellant nor appellees, below, have discussed, nor have the courts, below, considered that the approach there taken is contrary to the trend of modern decisional processes. Since the parties may also omit reference to this subject in this Court, it is believed that the attached brief, which applicant is requesting permission to file as *amicus curiae*,

will serve to throw additional light upon, and act as an appropriate additional argument on the question to be decided. If this argument is accepted, it will be dispositive of the case now at bar.

Respectfully submitted,

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November 17, 1960.

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 155

MICHIGAN NATIONAL BANK, a banking association organized under the laws of the United States,

Appellant,

NATIONAL BANK OF WYANDOTTE, THE FIRST NATIONAL BANK (THREE RIVERS, MICHIGAN), COMMERICAL NATIONAL BANK OF IRON MOUNTAIN, THE NATIONAL BANK OF JACKSON, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF KALAMAZOO, banking associations organized under the laws of the United States,

Intervening Plaintiffs,

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STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and LOUIS M. NIMS, STATE COMMISSIONER OF REVENUE,

Appellees.

On Appeal from the Supreme Court of the State of Michigan

BRIEF OF THE FRANKLIN NATIONAL BANK OF LONG ISLAND AS AMICUS CURIAE

Interest of Amicus Curiae

The Franklin National Bank of Long Island is a national banking association, with its principal place of business in Mineola, Nassau County, New York, operating branches in Nassau and Suffolk Counties, New York.

1. There is now pending in the Supreme Court of the State of New York an action for a declaratory judgment entitled *The Franklin National Bank of Long Island* v. *G. Russell Clark, Superintendent of Banks of the State of New York, et al.*, (New York County Clerk's index number 9734/1960), wherein the present *amicus curiae*, as plaintiff, seeks a declaratory judgment against the Superintendent of Banks of the State of New York, two commercial banks with principal offices in New York City and eight savings banks with principal offices in New York City to the effect that a recent statute of New York, colloquially know as the New York Omnibus Banking Law of 1960 is unconstitutional upon the grounds, among others, that it deprives plaintiff of due process of law and the equal protection of the laws. Two of the questions importantly involved in that litigation are closely related to a main question presented for a decision in the instant case. They are: first, whether, *as a matter of law*, a savings and loan association or similar banking institution, no matter how great the extent of its employment of capital in competition with a national banking association, must, nevertheless, be deemed not a similar institution and thereby become immune from burdens statutorily imposed on national banking associations located in New York; and, second, whether the Court, because *as a matter of law* it assumes similarity (or dissimilarity), may refuse to receive evidence as to the factual identity or non-identity of the operations of competing banking institutions.

2. In the State of New York, taxes against national banking associations, such as applicant, are levied on a basis different from those levied against savings and loan associations (*New York Tax Law*, Arts. 9-B and 9-C), with the result that a discriminatory tax could be levied upon applicant's shares if this Court should determine that, *as a matter of law*, irrespective of the *fact* of competition, savings and loan associations are not in competition with national banking associations.

3. The determination in the instant case that, as a general proposition, *as a matter of law*, a savings and loan association may not be deemed in competition with a national banking association, could have disastrous repercussions against applicant and others similary situated. If there is foreclosed from *factual* determination the question whether a savings and loan association or similar institution is (or is not) in competition with a national bankng association, statutory classifications, whose constitutional validity must rest upon the fact of competition (or non-competition), could be imposed at the will of a legislature and thus deprive national banking associations of valuable rights. Such an imposition of burdens upon an assumption of non-competition is one of the important points at issue in the litigation mentioned in subdivision 1, above. Unless this Court rejects the assumption of the Michigan courts, in the instant case, that the question of competition is to be resolved *as a matter of law* based upon earlier precedents, the rights of The Franklin National Bank of Long Island may be seriously impaired and its ability to litigate the question on a *factual* basis may be deemed prevented and its ability to compete on a fair basis with savings and loan associations and similar institutions would be substantially impaired or even destroyed.

Summary of Argument

The Michigan courts erred in determining, *as a matter of law*, that earlier precedents require a holding that savings and loan associations are not in competition with national banks. Such a holding is a departure from modern decisional processes and can have devastating effects upon the rights of national banking associations, not only in matters involving taxation but in all other fields of activity, where the States attempt to enforce restrictive legislation, based on the alleged constitutional power of classification.

ARGUMENT.

I

The Reasons Assigned By The Courts, Below, In Ruling As A Matter Of Law That Savings And Loan Associations Are Not In Competition With National Banks, Are A Retrogressive Departure From Modern Judicial Decisional Processes.

The courts, below, have ruled that, *as a matter of law*, savings and loan associations in Michigan are not in substantial competition with appellant and other national banking associations. Examination of the opinions, below, shows that they are based upon the proposition that a number of precedents have established, beyond present recall, the differences in nature between savings and loan associations and national banks. Because of these precedents (many of them quite ancient), the Michigan courts have apparently felt themselves constrained to apply *as a rule of law*, the concept that "Michigan building and loan associations operated in a narrow, restricted field, are

markedly different in character, purpose and organization from national banks, and are not in 'substantial competition' with national banks." *Michigan National Bank* v. *State of Michigan, et al.* [the instant case], 358 Mich. 611, 639). Although the Michigan Supreme Court stated (*ibid.*) that its conclusion was reached because "[t]he record in this appeal discloses" the foregoing as a matter of fact, *nothing* in the record so indicates and the entire opinion demonstrates that it is based *completely* upon earlier cases, decided in a remote era (see, *e. g.* 358 Mich. at p. 623, *et seq.*). The opinion of the Michigan Court of Claims frankly stated that its conclusions were based on holdings of the courts since 1887 to the effect that a state could exempt from taxation or prefer "on the ground of public policy mutual savings bank and other like institutions" and that the power of the state to make such exemptions "on the ground of public policy is an important one, grounded in history and on precedent." The Supreme Court of Michigan, quoting the foregoing matter, stated that this was the basis upon which the Court of Claims "justified its finding of no cause of action." (358 Mich. at pp. 619-620).

Thus, the position of the courts, below, is that precedent, expressed in *generalities* culled from earlier decisions, justified "partial exemption" from taxation and that this precedent is sufficiently immutable to insulate savings and loan associations from the onerous tax burdens imposed on national banking associations, leaving no recourse to national banks to protect themselves through court action.

It is submitted that the underlying error, here, is *not* the application of a precedent to a state of facts, but the failure to recognize that the *precedent, itself requires mutation or abandonment* by reason of a new fact situation in the economic field, which the record demonstrates beyond peradventure of doubt.

This error is a departure from all modern judicial decisional processes. To sustain the Constitution as a living document, this Court, by the modern trend of its decisions, has refused to regard the generalities of past precedents as a *final* statement of the law, where intervening economic and social factors have required reexamination of the premise upon which such precedents were originally based.

Tigner v. *Texas*, 310 U. S. 141, is in point. There, this Court had under consideration a provision of a Texas anti-trust law, under which the defendant had been indicted, charged with participation in a conspiracy to fix the retail price of beer, and his indictment had been sustained by the Texas Court of Criminal Appeals. The defendant claimed that the statute was unconstitutional, because, by its terms, it did not "apply to agricultural products or live stock in the hands of the producer or raiser" (*Texas Penal Code*, title 19, ch. 3, Art. 1642). Forty years earlier this Court had held a practically identical statute unconstitutional as offensive to the safeguards afforded by the equal protection of the laws provision of the Fourteenth Amendment (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540). "If that case controls," said this Court, "appellant contends, the Texas Act cannot survive and he must go free." (310 U. S. at p. 144). The opinion of this Court went on to say:

> "The court below recognized that the exemption was identical with that deemed fatal to the Illinois statute involved in Connolly's Case. But it felt that time and circumstances had drained that case of vitality, leaving it free to treat the exemption as an exercise of legislative discretion. . . . . Dealing as we are with an appeal to the Constitution, the Connolly Case ought not to foreclose us from considering this exemption in its own setting." (*Ibid.*)

The opinion of this Court (310 U. S. at pp. 145-147) then considered changes in the treatment of the differences between agriculture and industry "[s]ince Connolly's Case was decided, nearly forty years ago," held that the statute in the light of modern economic situations was constitutional and sustained the indictment. The opinion demonstrated the economic necessity for the abandonment of the prior rule of law in the following language:

> "The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. Connolly's Case *has been worn away by the erosion of time*, and we are of opinion that it is no longer controlling." (310 U.S. at p. 147, emphasis supplied).

In the case now at bar, there is ample and uncontradicted proof that earlier doctrines have been worn away by the erosion of time. No longer are savings and loan associations small aggregations of poor people banded together for mutual help. No longer are national banks refused permission to make mortgage loans, thus keeping them factually out of competition with savings and loan associations. The *factual situation* is that savings and loan associations are highly competitive with national banks and that they employ a substantial part of their funds in such

competition.* Thus, the very factors that underly the decisions of the Michigan courts, herein, have ceased to exist as a matter of fact. *No* decision of this Court has held that they must be deemed to have a continued existence *as a matter of law.*

Brown v. *Board of Education*, 347 U. S. 483, furnishes an excellent example of the modern trend of the judicial decisional process. This Court there had under consideration the power of a State, either by statute or a State constitutional provision, to provide for segregation of negro and white children in public schools. For many years (since 1896) the leading case on the subject of segregation was *Plessy* v. *Ferguson*, 163 U. S. 537, which had held that it was not a violation of the Fourteenth Amendment to separate the races, provided the accommodations for each race were substantially equal. This was the so-called "separate but equal" doctrine.

In the *Brown* case, this Court stated that the question was "directly presented" whether, despite equalization of facilities for difference races, segregation was constitutionally permissible upon the doctrine ["separate but equal"] of the *Plessy* case: This Court significantly stated:

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." (347 U. S. at pp. 492-493).

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* An example of competition *as a matter of fact* is afforded by a New York statute, which empowers savings and loan associations to rent to its members safe deposit boxes for the keeping of securities, jewelry and valuable papers. (New York *Banking Law*, § 383-a.).

Later in its opinion, this Court added, when concluding that there is a detrimental psychological effect of segregation upon negro children, that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected."

Here, we have the modern, realistic approach to ancient rules of law. The emphasis is *not* upon the application of a fixed doctrine to the state of facts shown by a record, but rather upon determination whether the doctrine, itself, should be abandoned or changed in the light of modern *factual* conditions and knowledge. The opinions, below, in the instant case, are a retrogressive departure from this modern decisional approach.

CONCLUSION

The judgment, below, should be reversed.

Respectfully submitted,

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